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KEMENTERIAN PERTAHANAN MALAYSIA & ANOR v. SME ORDNANCE SDN BHD

COURT OF APPEAL, PUTRAJAYA
HASHIM HAMZAH JCA
MOHAMED ZAINI MAZLAN JCA
B ISMAIL BRAHIM JCA
[CIVIL APPEAL NO: W-Q1(NCvC)-598-11-2023]
27 OCTOBER 2025

C **Abstract** – *Pursuant to the case of Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd, once a breach and a valid clause pertaining to liquidated ascertained damages ('LAD') are proven, the burden shifts to the defaulting party to prove that the LAD amount imposed was unreasonable or excessive. In discharging this* D *burden, the defaulting party cannot simply rely on the personal opinion of a witness, regarding the excessiveness of the LAD amount.*

CONTRACT: *Breach – Delay – Claim for liquidated ascertained damages ('LAD') – Right to claim for LAD maintained despite extensions of time – Whether LAD amount claimed unreasonable or excessive – Whether principles in Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal or Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd applicable – Whether* E *defaulting party successfully discharged burden of proving LAD amount claimed excessive – Whether could rely on personal opinion of witness regarding excessiveness of LAD amount imposed – Whether there was misapplication of s. 75 of Contracts* F *Act 1950*

The first and second appellants were the Ministry of Defence and the Government of Malaysia. The respondent was SME Ordnance Sdn Bhd. In 2002, the second appellant agreed to purchase 400 units of missile directly from the Government of Pakistan, which would be supplied by a Pakistani G OEM supplier, Global Industrial & Defence Solutions ('GIDS'). In 2014, the respondent was appointed by GIDS as its sole Malaysian agent. The agreed contract sum for the purchase was RM41,922,000 ('contract sum'). As per the letter of acceptance, the initial delivery date for the missiles was set for 31 October 2016, before it was amended to 30 November 2016. Due H to various issues, particularly GIDS' inability to supply the missiles within the agreed delivery date, the delivery date was renegotiated several times, leading to the execution of two supplementary contracts. Under the first supplementary contract, the delivery date was extended to 31 July 2017, whereas under the second supplementary contract, it was further extended to I 30 April 2018. Despite these extensions, the appellants maintained their right to claim liquidated ascertained damages ('LAD') for late delivery. The missiles were eventually delivered by the respondent on 4 May 2019. After the delivery, the appellants imposed LAD on the respondent in the amount

of RM10,312,812 ('LAD amount'), calculated from 30 April 2018 to 4 May 2019. This LAD amount was deducted from the respondent's final payment under the contract sum. Dissatisfied, the respondent filed appeals against the appellants' decision to impose LAD, but these appeals were rejected. The respondent then filed a suit against the appellants in the High Court. The High Court, in allowing the suit in part, declared that the imposition of LAD by the appellants was wrong, improper and/or unlawful. The High Court ordered the appellants to repay the LAD amount, with 5% interest per annum, to the respondent. The High Court ultimately concluded that the LAD imposed was excessive and unreasonable. In arriving at this decision, the High Court specifically relied on the admission of the appellants' own witness ('DW1') that the appellants had not suffered any financial losses from the late delivery of the missiles. Aggrieved, the appellants filed the present appeal. In this appeal, two main issues arose. Firstly, the appellants argued that the High Court had erred by deciding on matters not pleaded by the respondent. The respondent had never raised any issue that the LAD imposed was unreasonable or excessive. Secondly, the appellants submitted that the High Court erred by relying on *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* instead of *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* ('*Cubic*'). The High Court also misapplied s. 75 of the Contracts Act 1950 ('CA') to the facts of the instant case. The appellants further submitted that although the High Court initially found correctly that the appellants had the right to impose LAD without needing to prove actual loss, it later erred by concluding that the LAD amount was unreasonable.

Held (allowing appeal)
Per Ismail Brahim JCA delivering the judgment of the court:

(1) In *Cubic*, it was clarified that once a breach and a contractual LAD clause were proven, the burden shifted to the defaulting party (the respondent) to prove that the LAD amount was unreasonable or exorbitant. In the present case, the High Court correctly found that the appellants had the right to impose LAD without needing to prove actual loss. Having reached that decision, the High Court then erred by relying on DW1's testimony to conclude that the LAD amount was 'unreasonable'. The High Court nevertheless was correct in holding that time was of the essence and that the delivery date was not at large, and that there was a breach of the contract terms regarding the delivery date. Consequently, the appellants, as the innocent parties, did have the right to impose LAD against the respondent. (paras 18-21)

(2) The burden had shifted to the respondent to prove the unreasonableness of the damages clause or the sum stated therein. In this case, the High Court's conclusion that the LAD imposed was excessive or unreasonable was largely based on DW1's testimony that the appellants had not suffered financial losses due to the late delivery. However,

DW1 clarified during re-examination that his assessment of excessiveness was only his personal opinion. The respondent had not adduced any other evidence to demonstrate that the contractual LAD was unreasonable or to propose a reasonable alternative amount. As such, the respondent failed to discharge the said burden. In fact, by denying any LAD without the respondent showing what would be a reasonable amount, the High Court had effectively imposed a burden on the appellants contrary to the principles in *Cubic*. (paras 22, 23 & 26)

(3) Even if the respondent had discharged the burden under *Cubic* to show that the LAD was exorbitant, the High Court's remedy was fundamentally flawed. Section 75 of the CA clearly entitles the injured party to receive 'reasonable compensation not exceeding the amount so named'. By deciding that the LAD clause was unenforceable and ordering a full refund of the LAD amount, the High Court effectively awarded the appellants zero compensation despite finding a breach. Considering *Cubic* and the appellants' entitlement to reasonable compensation, the High Court erred in ordering a complete refund of the LAD amount and committed an error of law regarding both the quantum of proof and the remedy mandated by s. 75 of the CA. (paras 27 & 28)

Case(s) referred to:

Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(foll)***

Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal [2021] 10 CLJ 206 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 75

For the appellants - Nurirmawatie Daud & Norhaina Zulkifli; SFCs
For the respondent - Mohd Munzeer Zainul Abidin; M/s Yusfarizal, Aziz & Zaid

[Editor's note: For the High Court judgment, please see SME Ordnance Sdn Bhd lwn. Kementerian Pertahanan Malaysia & Satu Lagi [2024] 3 CLJ 586 (overruled).]

Reported by Syamim Ariffin

JUDGMENT

Ismail Brahim JCA:

Introduction

[1] This is an appeal against the decision of the learned High Court Judge (LHJ) delivered on 16 October 2023, which allowed, in part, the claims of SME Ordnance Sdn Bhd (the "respondent" or "plaintiff in the High Court") against the Ministry of Defence Malaysia (first defendant) and the Government of Malaysia (second defendant) (the "appellants"). The High Court in its decision declared that the imposition of liquidated ascertained damages (LAD) amounting to RM10,312,812 by the appellants against the

respondent was wrong, improper, and/or unlawful, and ordered the appellants to repay this sum, together with 5% interest per annum from the date of judgment until full settlement. The appellants, being dissatisfied with this decision, have filed the present appeal.

Brief Facts Of The Case

[2] The dispute between the parties originated from a contract for the procurement of 400 units of Bakhtar Shikan Model 8C Missiles for the Malaysian Army, initially, in 2002, the Malaysian Government purchased launchers and munitions directly from the Government of Pakistan. By 2014, Global Industrial & Defence Solutions (GIDS), the OEM supplier from Pakistan, appointed the respondent as its sole agent in Malaysia.

[3] Based on the facts, a contract sum of RM41,922,000 was agreed upon for 400 units of missiles. A letter of acceptance ("surat setuju terima") was issued on 17 December 2014, with an initial delivery date of 31 October 2016, later amended to 30 November 2016. The main contract ("kontrak utama") was executed on 6 June 2015.

[4] Due to various issues, primarily involving GIDS's inability to supply on time due to Pakistan's military needs, the delivery date for the supply of the missiles was renegotiated several times, leading to the first supplementary contract (where delivery date was extended to 31 July 2017) and the second supplementary contract (where delivery date was extended to 30 April 2018). Despite these extensions, the appellants maintained their right to impose LAD. The respondent eventually delivered the missiles in May 2019, which were verified on 17 May 2019.

[5] However, after the delivery, the appellants imposed LAD amounting to RM10,312,812, calculated from the extended delivery date of 30 April 2018 until the actual delivery on 4 May 2019. This sum was deducted from the final payment to the respondent. The respondent's appeals for waiver of the LAD were rejected, leading to the suit in the High Court.

[6] In his decision, the LHJ found that time was not at large and was the essence of the contract. He also found that the appellants had proven a breach by the respondent for late delivery (which is undisputed) and were entitled to impose damages. However, the LHJ ultimately concluded that the LAD amount of RM10,312,812 was excessive and unreasonable. From the grounds of judgment, the LHJ specifically relied on the testimony of the appellants' own witness (DW1) who had admitted in his testimony that the appellant had suffered no financial losses.

[7] The relevant part of the judgment on this issue is reproduced *verbatim*:

> Berhubung isu ini, setelah mahkamah meneliti fakta-fakta yang dikemukakan semasa perbicaraan serta hujahan-hujahan yang dibuat oleh pihak-pihak, mahkamah mendapati bahawa Kontrak Utama telah pada asalnya menetapkan tarikh penghantaran misi adalah pada atau sebelum 30.11.2016 sepertimana yang telah sedia dinyatakan di klausa 9. Pada

tahap ini mahkamah mendapati bahawa klausa 9 adalah ternyata perlu dibaca bersama-sama dengan klausa 35 yang telah secara nyata dan terang memperuntukkan bahawa masa adalah merupakan intipati kontrak. Sementara itu, klausa 39 pula memperuntukkan bahawa sebarang pindaan kepada kontrak tidak akan menjadi berkuatkuasa melainkan sekiranya ia dipersetujui oleh kedua-dua belah pihak dan dibuat secara bertulis dan dimeterai melalui satu perjanjian tambahan. Perkara ini adalah terbukti apabila wujudnya Kontrak Tambahan Pertama dan Kontrak Tambahan Kedua yang memberikan masa tambahan sepertimana yang telah dinyatakan di atas. Kedua-dua Kontrak Tambahan Pertama dan Kontrak Tambahan Kedua ini masih mengekalkan terma yang khusus berhubung dengan isu masa di mana ia adalah masih merupakan intipati kontrak. Ini jelas menunjukkan bahawa pada hakikatnya, terma yang utama ini tidak pernah diniatkan untuk digugurkan sama sekali oleh pihak-pihak.

Mahkamah turut mendapati bahawa saksi plaintif iaitu PW1 telah bersetuju semasa disoal balas bahawa apabila kontrak dimeterai dengan pihak kerajaan iaitu defendan kedua di dalam kes ini, maka pihak-pihak adalah terikat dengan terma-terma perjanjian tersebut. Perihal yang sama turut dipersetujui oleh plaintif yang melibatkan terma-terma yang sama di dalam Kontrak Tambahan Pertama dan Kontrak Tambahan Kedua. Selanjutnya, memandangkan plaintif tidak berupaya untuk meiaksanakan penghantaran misil pada 30.4.2018 yang merupakan tempoh masa lanjutan di bawah Kontrak Tambahan Kedua dan susulan daripada mesyuarat-mesyuarat yang diadakan di antara pihak-pihak pada 2.8.2018 dan 21.12.2018 bagi membincangkan isu ini, maka defendan-defendan telah bersetuju untuk memberikan plaintif tarikh yang akhir bagi penghantaran misil tersebut yang mana ianya telah dilanjutkan sehingga 30.3.2019. Walaubagaimanapun, adalah perlu ditekankan bahawa defendan-defendan telah jelas berpendirian bahawa ia adalah tetap tertakluk kepada hak defendan kedua untuk mengenakan gantirugi. Mahkamah mendapati bahawa hak ini nampaknya tidak sesekali pernah diabaikan oleh defendan-defendan terutamanya defendan kedua. Susulan itu, gantirugi telah kemudiannya dikenakan oleh defendan kedua bermula daripada 30.04.2018.

[8] On the imposition of LAD which the LHJ found as excessive and unreasonable, the LHJ stated as follows:

Berhubung dengan isu ini, mahkamah mendapati bahawa defendan-defendan telah berjaya membuktikan bahawa pertamanya, telah wujud kemungkinan kontrak di pihak plaintif dan keduanya, kontrak yang berkenaan adalah ternyata memperuntukkan terma yang memberikan hak kepada defendan kedua untuk mengenakan gantirugi. Jika ini berjaya dibuktikan, maka secara prinsipnya defendan kedua adalah seharusnya berhak untuk mengenakan gantirugi, tidak kiralah sama ada kerugian sebenar telah dibuktikan ataupun tidak. Walaubagaimanapun, perkara ini tidaklah bermaksud bahawa penganalisaan berhubung isu ini hanya terhenti di situ sahaja. Ini adalah kerana plaintif masih boleh untuk

menunjukkan bahawa gantirugi yang telah ditetapkan oleh defendan kedua adalah keterlaluan dan tidak munasabah. Rumusan berhubung dengan perkara di atas adalah jelas diperuntukkan melalui seksyen 75 Akta Kontrak 1950 yang memperuntukkan sebagaimana berikut:

> 75 Compensation for breach of contract where penalty stipulated for when a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case maybe, the penalty stipulated for.

Merujuk kepada seksyen 75 Akta Kontrak 1950, ia jelas menunjukkan bahawa sekiranya sesuatu kontrak itu mempunyai klausa berhubung dengan isu gantirugi atau pampasan, maka pihak yang tidak bersalah adalah dibenarkan untuk membuat tuntutan gantirugi tetapi jumlahnya mestilah munasabah serta tidak melebihi jumlah yang telah ditetapkan di dalam kontrak. Jika dirujuk kepada hujahan plaintif berhubung dengan isu ini, mereka berpendirian bahawa adalah merupakan undang-undang mantap di mana gantirugi yang dikenakan mestilah tertakluk kepada suatu jumlah yang munasabah. Maka, hujahan yang dibuat oleh plaintif selanjutnya adalah bahawa memandangkan satu-satunya saksi dipihak defendan-defendan telah bersetuju serta menyatakan bahawa jumlah gantirugi yang dikenakan oleh kerajaan adalah keterlaluan, maka sudah tentu ianya adalah merupakan suatu jumlah yang tidak munasabah yang dikenakan oleh defendan kedua.

Berhubung isu ini, setelah mahkamah meneliti hujahan pihak-pihak, mahkamah mendapati bahawa walaupun defendan pertama teiah mengenakan gantirugi sejumlah RM10,312,812.00 yang mana perkara ini tidak sesekali diragui oleh mahkamah bahawa ianya adalah berpandukan kepada kontrak yang dimasuki oleh pihak-pihak, namun mahkamah tidak boleh menutup mata terhadap satu fakta yang penting di mana DW1 sendiri telah dengan yakinnya mengakui bahawa adalah sememangnya tidak wujud sebarang kerugian kewangan di pihak defendan-defendan walaupun wujudnya kegagalan di pihak plaintif untuk mengemukakan misii tersebut di dalam tempoh masa yang dipersetujui. Berhubung dengan perkara ini, kata DW1 lagi, apa yang wujud adalah hanya kerugian yang melibatkan isu perancangan operasi tentera. Itu sahaja. Namun, mahkamah tidak mempunyai apa-apa dokumen yang berkaitan dengan perkara ini untuk dirujuk bagi menunjukkan bagaimana operasi tentera teiah menjadi tergendala. Maka, dalam isu ini, mahkamah bersetuju dengan hujahan plaintif bahawa defendan-defendan telah gagal melepaskan beban pembuktiannya bagi menunjukkan kewujudan kerugian tersebut. Selanjutnya, plaintif berhujah bahawa jumlah gantirugi yang dikenakan sebanyak RM10,312,812.00 adalah keterlaluan kerana ia adalah

sebanyak lebih kurang 24% daripada jumlah nilai kontrak. Bagi maksud ini, mahkamah merujuk kepada kes *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* [2021] 10 CLJ 206 di mana Hasnah Mohammed Hashim HMP ketika beliau menyampaikan penghakiman Mahkamah Persekutuan di ms 231, 235 & 236 telah dengan nyata dan jelasnya berpendirian bahawa:

> [54] When there is a clause on damages, the court must evaluate the reasonableness of the clause in question, what is "reasonable" must naturally be based on the available evidence. Abdul Aziz J in *Wearne Brothers (M) Ltd v. Jackson* [1966] 1 LNS 210; [1966] 2 MLJ 155 observed:
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> > The distinction between liquidated damages and penalty has ceased to be of great legal importance because the result in either case is that the court must determine reasonable compensation.
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> [55] Section 75 CA provides:
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> > When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case maybe, the penalty stipulated for.
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> [56] The Federal Court in *Selva Kumar* (*supra*) sets out the guiding principle in construing the application of s. 75 CA. The court must evaluate the clause against the available evidence to ascertain whether the amount calculated based on the clause is proportionate to the legitimate interest of the innocent party in the performance of the primary obligation. If the amount stipulated in the clause is exorbitant, then the clause must be regarded as an unreasonable "penalty clause" and therefore void.
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> ...
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> [69] Before the High Court, Plenitude did not adduce any evidence that sum stipulated in cl. 11.2 is an accurate representation of its loss of profits so as to allow the court to determine whether or not their profit projection is highly speculative or grossly excessive to avoid unjust enrichment. On the facts and evidence, Plenitude failed to prove the sum claimed based on the formula. An award of damages must be proportionate to the loss suffered. Plenitude failed to prove its losses in order to receive the benefit of the cl. 11.2 and must also necessarily fail to prove its losses in its claim for general damages.

[70] If the sum stipulated in the agreement is extravagant and unconscionable in amount in comparison with the loss which could conceivably be proved to have followed from the breach then it must be regarded as a penalty (See: *Clydebank Engineering Company v. Yzquierdo y Castaneda (Don Jose Ramos)* [1905] AC 6). A genuine pre-estimate of damages, on the other hand, would be anticipated damages calculated reflective of the loss that a party to an agreement may suffer as a consequence of the breach. Damages which are excessive or disproportionate are not a genuine pre estimate of loss and maybe held by the court to be a penalty and, therefore, un enforceable Lord Diplock in *Scandinavian Trading Tanker Co AB v. Fiota Petrolera Ecuatoriana (The "Scaptrade"*) [1983] 2 AC 694 at p. 702:

> The classic form of penalty clause is one which provides that upon breach of a primary obligation under the contract secondary obligation shall arise on the part of the party in breach to pay to the other party a sum of money which does not represent a genuine pre-estimate of any loss likely to be sustained by him as the result of the breach of primary obligation but is substantially in excess of that sum.
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> The classic form of relief against such a penalty clause has been to refuse to give effect to it, but to award the common law measure of damages for the breach of primary obligation instead.

[71] We agree with the Court of Appeal that cl. 11.2 appears to be a penalty clause under s. 75 CA. It is settled law that if a sum is named in a contract is exorbitant and unreasonable for it to be paid in case of breach, it must be treated as a penalty and therefore void under s. 75 CA.

[57] Berhubung isu ini, mahkamah selanjutnya mendapati bahawa jika pun kontrak utama telah mensyaratkan bahawa defendan kedua berhak untuk mengenakan jumlah gantirugi yang pastinya turut telah dipersetujui oleh plaintif ketika memasuki kontrak utama tersebut, namun ianya bukanlah sesuatu yang boleh diterima secara bulat-bulat oleh mahkamah. Ini adalah kerana sepertimana yang telah dizahirkan di dalam kes *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* [2021] 10 CLJ 206 seperti yang telah dirujuk di atas, maka dalam keadaan yang sedemikian, klausa berhubung dengan isu gantirugi tersebut adalah malangnya tidak dapat dikuatkuasakan. Bagi maksud ini, mahkamah telah mempertimbangkan di mana Jumlah kontrak yang terlibat adalah sebanyak RM41,922,000.00 manakala jumlah gantirugi yang dikenakan pula adalah sebanyak RM10,312,812.00. Berdasarkan ini, mahkamah mendapati bahawa jumlah gantirugi yang dikenakan adaiah melebihi 24.5% daripada jumlah nilai kontrak keseluruhan iaitu hampir satu perempat daripada jumlah RM41,922,000.00 yang

A mana ini adalah ternyata merupakan satu jumlah yang keterlaluan apatah lagi ditambah pula dengan fakta bahawa tidak wujud sama-sekali sebarang kerugian kewangan di pihak defendan-defendan sepertimana yang diakui sendiri oleh DW1.

B **The Issues In This Appeal**

[9] The crux of the appellant's appeal relates mainly to two main issues. Firstly, it was submitted that the High Court erred by deciding on an unpleaded case and issues that were not agreed upon. It was pointed that the pleaded case of the respondents was based solely on the issue that "time was C at large", and in the circumstances the LAD imposition was unlawful, warranting a full refund. It was further submitted that the respondent did not plead that the amount of LAD itself was unreasonable or excessive.

[10] Secondly, the appellants took the position that the High Court erred in relying on *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* D [2021] 10 CLJ 206 and misapplied s. 75 of the Contracts Act 1950 to the facts of the case. It was submitted that although the LHJ had correctly found the appellants had the right to impose LAD without needing to prove actual loss nonetheless the learned High Court Judge subsequently concluded that the imposition of the LAD as the amount was deemed unreasonable.

E **[11]** On the other hand, the respondent took the position that the findings of the LHJ was correct. The respondent argued that the High Court's finding that the LAD was excessive was based on admissions from the appellants' own witness (DW1), who confirmed that the appellants suffered no financial losses from the delay and agreed that the imposed LAD of 24.5% of the F contract value was excessive. It was also submitted that the appellants were aware of the respondent's profit margin and that the LAD would wipe out the profits from the sale. On the other hand, the appellants would not be suffering any losses.

G **[12]** Regarding the application of s. 75 of the Contracts Act, the respondent submitted that the said section clearly states that when there is a clause stipulating a certain amount of penalty in the event of a breach, the innocent party is entitled to reasonable compensation not exceeding the penalty stipulated. They referred to *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723; [2019] 6 MLJ 15 and H *Tekun Nasional v. Plenitude Drive (M) Sdn Bhd & Another Appeal* [2021] 10 CLJ 206, asserting that the High Court correctly evaluated the reasonableness of the LAD clause against the evidence. The respondent took the position that if a stipulated sum is exorbitant or unreasonable, it must be treated as a penalty and therefore void. Based on the said proposition it was submitted I that the High Court correctly applied this principle by refusing to give effect to the excessive LAD clause.

Our Decision

[13] In this appeal, it is to be noted that it was not disputed that **LAD was contractually agreed at 2% per month of the equipment value (cl. 15.1.3 of the main contract)**. (emphasis added)

[14] Next, it is to be noted that it was also not disputed that the calculation of RM10,312,812 was correct based on the agreed formula.

[15] As for the basis for the declaratory reliefs granted by the LHJ that the LAD was excessive and unreasonable, it is clear from the passage of the grounds of decision reproduced above, His Lordship premised his findings on the principles as stated in *Tekun*'s case (*supra*) and the admission of the appellant's witness in the trial on this issue. The basis of the appellant's contentions on this point is that by relying on the principles cited in *Tekun*, the LHJ misapplied the principles as laid down in another Federal Court's case *ie*, *Cubic Electronics* (*supra*).

[16] At this stage it is necessary to quote the following passage in *Tekun* which explained the application of *Cubic*'s case in *Tekun*:

> [24] We heard this appeal on 11 August 2020. By this time, there was a new development in the law in relation to s. 75 CA. This court had on 21 November 2018 decided on this issue in *Cubic Electronics Sdn Bhd (In Liquidation) v. Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723; [2019] 6 MLJ 15 (FC).
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> Application Of *Cubic*
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> [25] Before I proceed to discuss on the issue of damages, I find it is necessary to address whether *Cubic* (*supra*) applies to this appeal before us. The Federal Court in *Cubic* (*supra*) through the leading speech for the majority delivered by Richard Malanjum CJ (Sabah & Sarawak) (as he was then) articulately explained that the onus lies on the party seeking to enforce a damages clause under the said section to adduce evidence in support. Section 75 CA allows reasonable compensation to be awarded subject always to the defendant proving the unreasonableness of the clause and the sum stated therein. In the event there is a dispute as to what constitutes reasonable damages to be paid, the burden of proof falls on the defendant to show that the damages clause including the sum stated under the contract is unreasonable.
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> [26] *Cubic* (*supra*) was decided by this court on 21 November 2018, two years after the High Court's decision of this case on 15 November 2016. The Court of Appeal considered and decided the appeal on 24 April 2018 before *Cubic* (*supra*). Hence, the Court of Appeal was still relying on the earlier legal G position on the application of s. 75 CA.
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> [27] Learned counsel for Plenitude submitted that in *Cubic* (*supra*) the onus lies on the party seeking to enforce a clause under s. 75 CA to adduce evidence that there was a breach of contract and, upon a breach the sum that must be paid by the defaulting party is as stipulated

A specifically by the terms of the contract. The aggrieved party will be entitled to receive a sum not exceeding the sum stipulated in the contract irrespective of whether actual damage or loss is proven. Learned counsel further argued that this court must consider and apply the principles enunciated in *Cubic* (*supra*) where the burden falls on Tekun to show the unreasonableness of cl. 11.2 or to demonstrate based on evidence what B would be reasonable compensation. Tekun failed to discharge that burden and failed to prove that cl. 11.2 and the sum stipulated is not only exorbitant but unconscionable. Plenitude is, therefore entitled to the RM29,829,132.40 as agreed.

[17] The above passage above showed that *Tekun* was decided based on the C applicable principles prior to the decision of *Cubic*. It did not specifically state that the principles in *Tekun* is applicable to the present case which was completed and decided after *Cubic*'s was decided.

[18] In *Cubic*, the relevant passage clarified that once a breach and a contractual LAD clause are proven, the burden shifts to the defaulting party D (respondent) to prove that the LAD amount is unreasonable or exorbitant can be seen from the following passage:

(vi) Section 75 of the Act allows reasonable compensation to be awarded by the court irrespective of whether actual loss or damage is proven. Thus, proof of actual loss is not the sole conclusive determinant of reasonable E compensation although evidence of that may be a useful starting point.

(vii) The initial onus lies on the party seeking to enforce a damages clause under s. 75 of the Act to adduce evidence that firstly, there was a breach of contract and that secondly, the contract contains a clause specifying a sum to be paid upon breach. Once these two elements have been F established, the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract irrespective of whether actual damage or loss is proven subject always to the defaulting party proving the unreasonableness of the damages clause including the sum stated therein, if any.

G (viii) If there is a dispute as to what constitutes reasonable compensation, the burden of proof falls on the defaulting party to show that the damages clause including the sum stated therein is unreasonable.

[19] In the present case based on the grounds of decision, the LHJ had found the appellants had the right to impose LAD without needing to prove H actual loss. Having reached the conclusion, the LHJ subsequently concluded that the imposition of the LAD as the amount was deemed "unreasonable" particularly relying on the testimony of DW1 on this issue as mentioned earlier.

[20] Based on the findings, we are of the view that the LHJ was right in I arriving at his decision that time was of the essence of the contract and was not "at large" and there was a breach of the terms of the contract as far as the date for the delivery of the missile was concerned.

[21] Consequently, the appellants, as the innocent party, had a right to impose the LAD for the respondent's breach in the late delivery.

[22] The burden then shifts to the defaulting party (respondent) to prove the unreasonableness of the damages clause, or the sum stated therein.

In the present case from the grounds of decision, it is clear that the LHJ disallowed the liquidated ascertained damages (LAD) on the ground that the amount, being over 24.5% of the total contract value, was deemed unreasonable and excessive, after His Lordship had considered the testimony of the appellants' own witness (DW1) in admitting to no financial losses.

[23] In this regard we are of the view that the learned HCJ erred on the facts and the law in arriving at his decision for the following reasons:

> Firstly, the High Court's finding that the LAD amount was unreasonable was largely hinged on the admission by the appellants' witness (DW1) that the amount was "excessive" and that no "financial losses" were suffered by the appellants. However, it is crucial to consider DW1's testimony in its entirety. Based on the evidence, DW1 had clarified during re-examination that his assessment of the LAD as "excessive" was a personal opinion ("pandangan peribadi saya iah yang excessive") but that as a contract administrator, he was bound to execute the terms of the contract ("sebagai pentadbir kontrak, kita akan execute apa yang ada dalam kontrak dan setuju bersama oleh kedua-dua pihak").

[24] We are of the view that this clarification was significant and should be given due weight and ought not to be taken as the position of the appellant as a whole.

[25] Further as stated earlier, once the LHJ concluded that the appellants had a right to impose damages (LAD) for the respondent's breach in the late delivery, the burden then shifts to the defaulting party (respondent) to prove the unreasonableness of the damages clause, or the sum stated therein.

[26] From the evidence, we note that the respondent did not adduce any evidence to demonstrate that the contractual LAD was unreasonable or to propose a reasonable alternative amount apart from relying entirely on the personal opinion of DW1. The failure to discharge this burden was in our view was due to the fact that the respondent's case was premised merely on their claim for a full refund based on the argument that time was at large, and that the LAD was therefore unlawful. While the respondent later introduced the argument of excessiveness, we note they did not substantiate it with evidence beyond relying on DW1's personal opinion. The LHJ in then denying any LAD without the respondent having put forward evidence to show a reasonable amount, effectively imposed a burden on the appellants that was contrary to the principles laid down in *Cubic*.

A **[27]** We pause here to note that it is our view even if the respondent had discharged the burden under *Cubic* to show that the LAD was exorbitant, the High Court's ultimate remedy was fatally flawed. Section 75 of the CA 1950 clearly entitles the injured party to receive "reasonable compensation not exceeding the amount so named". By deciding that the LAD clause was
B "tidak boleh untuk dikuatkuasakan" (unenforceable) and ordering the full refund of RM10,312,812, the High Court awarded the appellants zero compensation despite finding a breach.

[28] In light of the binding precedent of *Cubic Electronics*, the appellants were entitled to reasonable compensation, the High Court erred in ordering
C a complete refund and committed an error of law regarding both the quantum of proof and the remedy mandated by s. 75 of the CA 1950.

[29] Based on the above reasons, we allowed the appeal by the appellant and set aside the decision of the LHJ for the declaratory order with no order as to costs.
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